



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 625 OF 2016

KAHARA MBUGUA.....CLAIMANT

-VERSUS-

NATIONAL INDUSTRIAL TRAINING AUTHORITY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 26th June, 2020)

JUDGMENT

The claimant filed the memorandum of claim on 15.04.2016 through Kamotho Njomo & Company Advocates. The claimant filed the amended memorandum of claim on 05.10.2017. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant's dismissal from the respondent's employment was un=procedural, unfair and unlawful and unconstitutional.
- b) An order do issue reinstating the claimant as the respondent's Manager Finance and Levy Administration.
- c) In alternative to (a) and (b) above, the claimant prays for remedies for wrongful dismissal and unfair termination as follows:
 - i. Compensation equivalent to 12 months' salary Kshs.3, 583, 344.00.
 - ii. Three months' pay in lieu of notice Kshs.895, 836.00.
 - iii. Severance pay at 15 days for each year Kshs.407, 198.19.
 - iv. 59 leave days not taken Kshs.800, 823.09.
 - v. Exemplary damages.
 - vi. Compensation for constitutional rights violation to be assessed.
 - vii. Certificate of service.
 - viii. A fine of Kshs. 100,000.00 against the respondent for failure to comply with mandatory provisions of section 51(3) of the Employment Act, 2007.
 - ix. Interest on (i) to (viii) above from the date of filing the suit
- d) Costs of the suit.
- e) Any other relief that the court may deem appropriate to grant.

The claimant's case is that he is a qualified Certified Public Secretary of Kenya (CPA-K) and a holder of IBA (Hons) and MBA in Finance with wide experience. He was appointed a Manager Finance and Levy Administration by the respondent per letter dated 30.09.2013. He served three months' probationary period and was confirmed in appointment on 27.08.2015 on permanent and pensionable terms of service.

The claimant's confirmation was subject to the claimant providing to the respondent's Board three letters of recommendation from his three previous employer – and the claimant's case is that such demand by the Board was contrary to the claimant's letter of appointment which provided that he would report to the respondent's Director General who was his supervisor.

The claimant's further case is as follows. In 2005 the respondent recruited one Gabriel Obasie as a Senior Accountant and reporting to the claimant. Further the said Gabriel Obasie was a close relative of the Chairman of the respondent's Board Audit and Integrity Committee so that the appointment was blended with conflict of interest. The claimant reviewed the performance of the said Gabriel and the appraisal was not positive resulting in strained relationship between the claimant and some members of the respondent's Board. Despite the poor performance of Gabriel as appraised, the respondent's Director General cautioned the claimant from sanctioning Gabriel and warning the claimant that the Board was actually contemplating removing him from office and his likely successor would be the underperforming Gabriel. In May 2015 the respondent's Board prepared a budget without the claimant's involvement and allocated themselves Kshs. 17, 000, 000.00 for overseas training. The allocation caused great public outcry leading to its cancelation. Prior to the cancelation the claimant had advised the Board against the training budget which the claimant advised was excessive and not prudent use of the respondent's meagre resources. Thereafter, the Board again allocated Kshs. 40,000,000.00 for the same activity at the start of the financial year through the Budget Harmonisation Process in circumstance that the claimant was not involved despite being the secretary for the Board Finance Committee. And the Committee was excluded in preparation of the training budget. The Cabinet Secretary Ministry of Labour and Social Services declined to approve the budget as overseas travel was not necessary and the training would be possible locally. It is the claimant's further case that the Board considered that he was the force behind the Cabinet Secretary's decision. Further a Board member took the view that the claimant was protecting the respondent's money as if it was his and that there would be no way the claimant would work for the respondent as long as that Board member was in place as such. It is therefore the claimant's case that the Board did not take kindly the claimant's objection to use of the respondent's scarce resources on foreign travel that was non-essential.

The claimant's further case is as follows. In March 2015 the Ethics and Anti-Corruption Commission (EACC) commenced investigations against the Board Chairman involving alleged irregular allowances drawn by the Chairman. In the circumstances the EACC summoned the claimant to record a statement which he did against the Chairman and the Director General warned him that his actions were not acceptable and his days with the respondent were numbered. The claimant states that the campaign to kick him out from the respondent's service then commenced in earnest. He received the letter dated 02.10.2015 conveying that the Board had decided he proceeds on compulsory leave for 45 days to pave way for investigations on alleged serious anomalies in the operations of the Finance and Levy Administration Department. The claimant's advocates replied by the letter dated 05.10.2015 stating they would reply substantively after studying the respondent's Human Resource Manual and the law. By the letter dated 06.10.2015 the respondent addressed the claimant's advocates that the claimant hands over office items and the claimant's advocates responded by the letter dated 07.10.2015 that in view of the letter dated 06.10.2015 the claimant would present himself on 08.10.2015 to hand over upon being supplied with the list of items and documents required from him. The letter by the claimant's advocates dated 08.10.2015 was not responded to and the claimant's advocates wrote the letter dated 09.10.2015 informing the respondent that the claimant would handover office keys, laptop and password to the office computer on 12.10.2015 which was a Monday and earliest working day. The claimant handed over to the Director General as his supervisor all the items as stated and as scheduled on Monday 12.10.2015. He also handed over to Gabriel, the Senior Accountant related to one of the Board members. In the meantime, the respondent split the Finance and Levy Administration Department into Finance Department and Levy Administration. Upon expiration of the 45 days of compulsory leave, by the letter dated 12.11.2015 the leave was extended by a period of two months. The claimant was concerned that he continued to draw salary without working at all. Thus he wrote the letter dated 03.12.2015 about delay in concluding investigation because during the entire period he had not been required to explain or clarify any matters.

The claimant's further case is as follows. He received a letter to show cause dated 21.12.2015 requiring him to reply allegations by 11.01.2016. He replied by the letter dated 07.01.2016 requesting for a copy of the investigation report with adverse findings against him; copies of documents related to the allegations levelled; denying he had failed or refused to hand over; upon preliminary findings not shown to him the Board had already found him guilty; he knew about the notice to show cause on 22.12.2015 because prior to that date he had been on holiday with his family and he had not been checking his emails. On 11.01.2016 he received a letter dated 11.01.2016 extending the leave to 15.02.2016. He was invited to appear before the respondent's Board on 19.02.2016 to clarify issues relating to the show cause letter. By the letter dated 17.02.2016 the claimant protested that he had not been given the documents and investigation report he had asked for and wished to know the nature of the scheduled meeting.

The claimant's further case is that on 19.02.2016 he received a show cause notice to reply in writing with respect to the allegations about payment of Kshs.49, 236, 067.00 to CIC Insurance without following the provisions of the Public Finance Management Act, 2012 and the Public Procurement and Disposal Act; authorizing irregular payment of vouchers on standing imprest No. 4969 of Kshs. 690,000.00, No. 3840 of Kshs. 300, 000.00, and No. 2033 of Kshs. 690, 000.00; and failure to obey lawful instructions when asked to do so before proceeding on compulsory leave. On 22.02.2016 the claimant wrote reiterating his request in the letter dated 17.02.2016 for investigation report and other relevant documents to enable him to defend himself. He further indicated that he would be ready to defend himself within 5 days of receiving the report and documents. The respondent's Director General invited the claimant for a meeting outside the office styled as a friendly chat. He advised the claimant to resign because the Board had resolved that he had to go. The claimant made it clear he would not resign because he had done no wrong. The Director General explained that he was under extreme pressure that the claimant is terminated from employment. The claimant's letter of 22.02.2016 was not responded to but he attended the meeting of 25.02.2016 when the allegations were read out to him and he was asked to defend himself. The Chairperson of the respondent's Committee at the hearing was one Jacqueline Mugo and she made it clear that the investigation report would not be given to the claimant. The respondent's Director General called the claimant on 04.03.2016 and conveyed that the letter of termination was ready. The claimant picked the letter on 07.03.2016 together with the minutes of the meeting held on 25.02.2016. By the letter dated 18.03.2016 the claimant informed the respondent that the minutes were not a true reflection of the proceedings. The claimant also appealed against the summary dismissal by his letter dated 18.03.2016 but the appeal has not been determined at all.

The claimant's further case is that prior to termination he had 59 pending leave days. It is his case that the termination was unfair for want of procedural requirements in section 41 of the Employment Act, 2007. In view of his age and the circumstances, the Court should grant reinstatement or in alternative the payment as prayed for. Further, prior to the compulsory leave the claimant had a clean record of service.

The respondent filed a response to the memorandum of claim on 27.07.2016 through Sing'oei Murkomen & Sigei Advocates. The respondent admitted that it employed the claimant as Finance and Levy Administration Manager by the letter dated 30.09.2013. The

claimant's terms of service were per the letter of appointment and as per the Employment Act, 2007 and the respondent's Human Resource Policy and Procedures Manual. The claimant was confirmed in permanent employment on 27.08.2015. The claimant's confirmation had delayed due to investigations by the EACC clearance was required prior to the confirmation.

The respondent's further case is as follows. In August 2015 the respondent received confidential information from undisclosed sources and whistle blowers about alleged malpractices and irregular financial engagements in the claimant's Department leading to investigations and scrutiny. The investigations disclosed the claimant had failed to perform his duties with due care and skill per particulars as set out in the show cause letter and for the period January 2015 and October 2015. Irregular payments had been made in violation of section 197(1) and 198 (1) (b) and (c) of the Public Finance Management Act and the respondent's financial policies. On 02.10.2015 the respondent's Board resolved that the matter be further investigated. The claimant was put on compulsory leave for 45 days. The respondent in its pleadings confirms and does not deny the correspondence (after the compulsory leave) exchanged between the parties and as pleaded for the claimant. The notice to show cause was dated 21.12.2015. The allegations amounted to gross misconduct under section 44 (3) and (4) of the Employment Act, 2007 and section 10.35.2 of the respondent's Manual. The claimant was given opportunity but he failed to satisfactorily respond to the allegations and on 19.02.2016 he attended disciplinary hearing. He knew the particulars of the allegations but failed to answer on the merits. Another notice to show-cause was reissued dated 19.02.2016 detailing all allegations. The Respondent's Human Resource Governance and Administration Committee convened on 25.02.2016 and the claimant attended the disciplinary hearing in person. By the letter dated 04.03.2016 the claimant was informed about the outcome of the disciplinary hearing and provided with the relevant minutes of the disciplinary hearing. The claimant appealed the dismissal by his letter dated 18.03.2016. The appeal was heard and determined but the outcome has not been communicated in view of the present suit which has not been determined. The respondent's further case is that as per claimant's pleadings the position of Finance and Levy Administration has since been split and the office held by the claimant no longer exists. Further there is an in-post for the Levy Administration Manager. It is denied that the respondent through the Director General or other officer asked the claimant to resign. Further, the investigations against the Board Chairman by EACC relate to allegations particulars of which payments happened prior to the claimant's employment by the respondent and the claimant is not a star witness as alleged. Further the training budget in May 2015 had been approved by the Board in a meeting the claimant was present. The claimant was an officer involved in budget making process.

The respondent's further case is that the claimant was accorded due procedure and dismissed on account of the gross misconduct as was alleged against him. The respondent prayed that the suit be dismissed with costs.

The claimant testified to support his case. The respondent did not call a witness but relied on the documents and affidavits filed for the respondent.

The Court has considered the material on record including the pleadings, the evidence and written submissions filed for the parties. The Court makes findings as follows.

- 1) There is no dispute that parties were in a contract of service as pleaded for the claimant and admitted by the respondent.
- 2) There is no dispute that the respondent terminated the contract of service by way of the letter of summary dismissal dated 04.03.2016.
- 3) The evidence is that the claimant was served with the show cause letter and he attended the disciplinary hearing. To that extent the Court returns that the respondent complied with section 41 of the Employment Act, 2007 on notice and hearing prior to dismissal on account of misconduct or unsatisfactory performance. The claimant has lamented that the appeal had not been considered and determined but the respondent says it was determined but outcome not communicated in view of the pendency of the present suit. The Court considers that no court order stopped the respondent from determining the appeal and was therefore at liberty to convey the decision on the claimant's appeal one way or the other and that failure establishes unfair procedure surrounding the impugned dismissal. At the disciplinary hearing the claimant was given an opportunity to have an employee of his choice to be present but the Court finds that the offer was belated and not serious towards complying with section 41 of the Employment Act, 2007. The claimant's serious concern was that he had requested for certain documents so as to comprehensively respond to the allegations that had been levelled against him. The committee appears to have failed to specifically address that claimant's concern. Thus while formerly purporting to comply with section 41 of the Act on notice and hearing the employee, the Court returns that in this case, the respondent assumed an unfair procedure when it failed to address and to provide the investigation report, documents and information the claimant had specifically requested for so as to facilitate his defence. The allegations raised serious allegations of professional failures against the claimant and an alleged detailed investigation throughout the time the claimant was emplaced on compulsory leave. Thus in the circumstances and as submitted for the claimant, it cannot be said that the respondent in dismissing the claimant followed a fair procedure as envisaged in section 45 of the Act. The evidence is that the parties engaged in the correspondence as pleaded for the claimant and confirmed by the respondent's pleadings. The Court returns that the procedure for termination in the present case fell short of being fair when the respondent moved to undertake the disciplinary hearing without specifically addressing the claimant's request for the investigation report and other documents to facilitate his proper and complete defence. The Court further returns that in absence of addressing such fundamental issue at the disciplinary hearing and which went to the root of the reason for termination, it cannot be said that as at the time of termination the respondent had established that it had a valid and genuine reason relating to the claimant's capacity, conduct, compatibility and the respondent's operational requirements as to justify the dismissal as provided for in sections 43 and 45 of the Act. The Court therefore finds that the termination was unfair both in procedure and substance.
- 4) While making that finding the Court follows the holding in **Lawrence Lien Shoona –Versus- East Africa Portland Cement Company Limited [2018]eKLR** that where an employer declines to provide to the employee a copy of the forensic audit report and other necessary documents from which the charges originate from, the only interpretation the court makes is that the respondent had information it wished to keep away from the claimant and the Court. The same being the circumstance in the instant case, the Court finds that as submitted for the claimant, the claimant was seriously prejudiced.
- 5) The claimant has prayed for reinstatement. The undisputed evidence is that the office held by the claimant of Finance and Levy

Administration Manager has since been abolished. The Court holds that abolition of office overrides holding or claims to holding of the office so abolished. The Court therefore returns that the abolition of the office makes practicability to implement reinstatement in the instant case untenable and reinstatement is declined on that account per criteria in section 49 of the Act. In any event three years of limitation have since lapsed from the date of dismissal to the date of this judgment so that under section 12 of the Employment and Labour Relations Court Act, 2011 the remedy is time barred. It is declined. However, the evidence is that the office was abolished while the claimant was on compulsory leave and the Court returns that the abolition in the circumstances suggest, as per the claimant's case, the dismissal was predetermined and therefore adds to demonstrate that it was unfair.

6) The Court has found that the termination was unfair in procedure and substance. The claimant appears to have had a clean record of service and did not contribute to his termination. The Court has considered the period parties had been in employment relationship. The Court has considered that throughout the compulsory leave he was on full pay. The Court has considered that the respondent predetermined the dismissal when the office the claimant held was abolished despite his continued being on compulsory leave in that regard. In that consideration within section 49 of the Employment Act and to balance justice for the parties the claimant is awarded 6 months' salaries in compensation making Kshs. 298,612.00 x 6 thus **Kshs. 1, 791, 672.00** in compensation for unfair termination. Clause 22 of the letter of appointment provided for 3 months' termination notice and the claimant is awarded **Kshs. 895, 836.00** as prayed for because in the circumstances, the respondent was not entitled to terminate with shorter notice than was agreed upon.

7) As submitted for the respondent under the contract leave days would not be carried forward except with approval of the Director General and which was not established by the claimant to have been applied for and obtained. Thus on a balance of probability the claimant has established that he is only entitled to 30 days of leave as last due but not taken and he is awarded **Kshs. 298, 612.00** in lieu of the leave days due.

8) There was no dispute that the claimant is entitled to a certificate of service and the prayer is awarded.

9) The Court makes the finding that the claimant made no submissions on quantum of claimed exemplary damages or damages for alleged breach of constitutional rights. The prayers will fail as not justified because the compensation already made in this case is sufficient for the unfair termination in issue.

10) No submissions were made on the prayer for a fine and the Court considers that the same would only fall for consideration in an appropriate criminal proceeding before a court of competent jurisdiction. The claim and prayer will fail as misconceived and unjustified in the present civil case.

11) The prayer for severance pay is found lacking in justification. It is declined.

12) The claimant has substantially succeeded and is awarded costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for orders:

- 1) The dismissal by way of the letter of summary dismissal was unfair.
- 2) The respondent to pay the claimant a sum of **Kshs. 2, 986, 120.00** by 01.09.2020 (Less due PAYE) failing interest to be payable thereon at Court rates from the date of this suit till full payment.
- 3) The respondent to deliver the certificate of service to the claimant by 01.08.2020.
- 4) In view of the Covid 19 situation there be stay of execution of the decree until 01.09.2020.
- 5) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday, 26th June, 2020.**

BYRAM ONGAYA

JUDGE